

ON TRACTARIAN LAW

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"It is clear", wrote Wittgenstein in the *Tractatus*, "that ethics has nothing to do with punishment and reward in the usual sense of the terms" (6.422). But he insisted also that there must be some kind of ethical punishment and reward; "the reward", he tells us, "must be something pleasant, and the punishment something unpleasant" (*ibid.*). What I wish to argue here is that we can understand what Wittgenstein meant by "reward" and "punishment" by conceiving these notions as elements in a system of interrelated concepts connected with the idea of law.

Let us reflect, for a moment, upon the framework of a legal system. The operation of such a framework involves the existence of a judge, and of a legal process of some kind, culminating in a judgement. It involves an appeal to some characteristic set of features whose presence or absence in the life of a given subject is held to constitute his guilt or innocence. And it presupposes therewith a division of our actions into those which are legitimate and those which are illegitimate. My claim, now, is that equivalents of each of these notions underlie the ethical theory implicit in the *Tractatus*, that we can come closer to understanding this theory when we recognise that it relates not to traditional ethical notions of good and evil, but rather to what are in some sense legal notions of reward and punishment.

Every actually existing system of penal law rests on a more or less arbitrary division of institutions in society and, on a series of rites and customs (from marriages to declarations of war) having a quite special status in relation to other events within the society, and these in their turn involve an intricate network of picturing/mirroring/representing relationships between the various different levels. What is precluded to the members of a society subject to such a system is any kind of access to the totality of all relevant facts (including facts relating to the consequences of the working of the system itself). It is thus impossible for members of a society of this kind to gain an insight into any intrinsic rightness or justice with the system may possess: they simply have to accept it as it is.

There is type of idealisation or re-structuring of systems of this kind, however, which rests on a radical separation of the presiding elements of the law (together with, e.g., the ensuing rewards and punishments) from the life of the society, such elements being conceived as belonging to a wholly heterogeneous region at the limit of the world. Here, typically, it is some cosmic process—perhaps the history of the world as a whole—which is seen as serving the purpose of a trial, and guilt and innocence are seen as being decided in terms of the presence or absence of certain qualities (relating to membership in an elect, or to sinlessness, grace, wholeness of heart). Within societies of believers penal systems of this type can be presented as having absolute authority, for of the divine Judge it can indeed be claimed that He is in a position to survey the field of mundane human interaction *as a whole*; and it is not accidental that every Christian state, up to and including Habsburg Austria, has sought to introduce absolute authority into the legal and political sphere by presenting a picture of the system of law which is valid at any given stage as having emanated from a *Göttliche Satzung*.

Let us move, now, from the processes of legal deliberation within the life of a society, to the processes of ethical deliberation or self-reflection within the mind of a single subject. Such processes, when conceived purely psychologically, as elements in a temporal sequence of mental events, exhibit traits which are precisely parallel to those characteristic traits of the processes of penal law which we discussed above. Here, too, there is a division of (what

are in this case) psychic experiences into different levels, between which there is a complex network of picturing relationships. But most importantly we have what seems to be a more or less arbitrary selection of mental acts of certain customary forms (decisions, resolutions, feelings of conscience or of good will) as acts which are seen as enjoying a quite special status in relation to our other experiences.

For the self-reflecting subject who adopts a purely psychological view of the processes of mental deliberation there can clearly be no reason for accepting any *de facto* selection of certain particular acts as having authority over his life. Indeed he can have no grounds for regarding as intrinsically better *any* ordering of mental acts into positions of relative dominance. But as in the sociopolitical sphere, so also here, an idealisation can be projected which seems to resolve the problem of apparent arbitrariness which arises when a deliberative process is seen as possessing authority over itself, (the problem of *Kompetenz-Kompetenz*, a problem much discussed by Austrian legal theorists in the late 19th century: cf. Jonston, 1972, Ch. 5). The idealisation here consists in distinguishing in the psychological sphere two absolutely heterogeneous realms, an empirical-psychological realm proper, and a circumscribing ethical or metaphysical realm wholly disjoint from the former and structured in a quite different way. The claim is then advanced that from the standpoint of the latter it is possible to grasp the empirical psychological realm as a *whole*; nothing then stands in the way of the further claim that from this vantage point the subject may acquire an insight into the intrinsic rightness of some particular type of ordering of this realm and thereby of his life. The two realms would thus bear to each other a relation corresponding, in the above, to that between the empirical-social realm of human interaction and the divine realm of ultimate penal authority.

The table which concludes this paper is a sketch of the process leading to one such idealisation. It will be clear, I hope, that what this table represents is an interiorisation of law which would correspond, however crudely, to ideas underlying Wittgenstein's *Tractatus*. What distinguishes the Tractarian theory from its parallels,—for example in the works of Schopenhauer, Kierkegaard, and Weininger—is the manner in which the interiorisation is effected. To talk of interiorisation at all implies, of course, that the two heterogeneous realms are in some sense psychological in character; for Wittgenstein however the crucial concepts of legitimacy and illegitimacy do not apply directly to psychological entities: the primary application of these concepts is to *uses of language*, and the issue of the legitimacy of mental acts—and indeed of acts of overt behaviour—is treated as secondary to a much more fundamental issue concerning the legitimacy of the uses of language associated therewith. As Wittgenstein put it to a friend: "It wouldn't matter what you'd done; you might even have killed somebody. *It would matter how you talked about it!*" (quoted from McGinnis, 1978). (Thus it cannot be the case that everything in the world is "of equal value" as Wittgenstein, a reluctant moralist, would sometimes maintain.)

It was almost certainly from the writings of Kraus that Wittgenstein acquired this concern with the legitimacy of uses of language; (see my 1978, and also Benjamin, 1955). But there is a crucial difference between their two approaches. In Kraus's writings both that which belongs to the orbit of the law and the processes of the law itself are seen as being linguistically articulated. Not only does he wish us to regard every alien utterance as a potential crime; he expects further that we shall conceive his own utterances as the utterances of a judge. Thus the Krausian programme of legitimising or purifying language is threatened with a problem of *Kompetenz-Kompetenz* having precisely the same structure as those which we discussed above. In the *Tractatus* however the legitimising process is seen as belonging to a radically non-linguistic sphere, a sphere that is absolutely disjoint from the world, i.e. from the totality of that which admits of linguistic articulation (including our own empirical-psychological experiences). This disjointness reflects a difference of logical type: questions of legitimacy can only be formulated in relation to complexes of facts in the world; it is impossible to raise such questions concerning the process of legitimisation itself, or concerning the

criteria of legitimacy. Questions of this type are ill-formed (as, within the eschatological framework, are questions concerning the authority of God).

We might summarise Wittgenstein's position with the following words: so long as language is in order, a moral order (of a certain kind) is thereby also in force, both within the empirical-psychological sphere, and also within the sphere of overt human action. The precise nature of this order is as yet unclear. What is clear is that it will satisfy few of the basic principles of the liberal morality with which we are familiar. Moral order is exclusively a matter of the bearing of the individual within the world; it is a matter of doing one's duty, of getting on with the job, of accepting one's destiny without question. It is only when language comes between this acceptance and the everyday course of one's life, whether as excuse, apology, self-doubt, rationalisation, or conceit, or in the form of spurious acts of will, that ethical punishment arises, punishment which is inseparable from the acts in question.

REFERENCES

- Benjamin, W., 1955: "Karl Kraus", in *Illuminationen*, Frankfurt: Suhrkamp.
Johnston, W., 1972: *The Austrian Mind: An Intellectual and Social History 1848-1938*, University of California Press.
McGuinness, B. F., 1978: "Wittgenstein's geistige Kinderstube", paper read at the 3rd International Wittgenstein Symposium Kirchberg/Wechsel, 1978.
Smith, B., 1978: "Law and Eschatology in Wittgenstein's Early Thought", *Inquiry*, 21 (December 1978).
Smith, B., 1979: "Kafka and Benvenuto: A study in Descriptive Psychology", forthcoming in *Structure and Gestalt: Philology and Literature in Austria-Hungary*. Amsterdam: Benjamin.

APPENDIX

III. Tractarian Law (an interiorisation of I)	relative to a given canonical notion, the well-formedness of my empirical, psychological experiences (the presence or absence of thoughts)	the individual himself <i>qua</i> ethical/ metaphysical subject (an interiorised God)	an <i>inner tribunal</i> , a process of non-articulated reflection upon my life/upon the world as a whole (i.e. a process of reflection upon the totality of my thoughts and thus also upon that which is presented in this totality)	an instantaneous ethical-mythical <i>feeling</i> (which cannot be propositionally articulated, since it would then belong to the totality toward which it is itself directed)	living in the world of the unhappy man (ethical punishment)/living in the world of the happy man (ethical reward)
II. Divine Law (an idealisation of I)	relative to a given religious code, the sinfulness (guilt, wholeness of heart) revealed in the whole of the life of a given individual subject	God (metaphorical extension of the idea of a mundane judge)	an idealised version of a mundane penal trial conceived as taking place beneath a heavenly firmament ("celestial tent", itself a metaphorical amplification of a mundane court of law	instantaneous deliberations of God, who grasps, successively, the whole of the life of each individual subject	-living in hell/living in heaven; (both metaphorical extensions of the world itself, seen under certain aspects)
I. Mundane Penal Law	The court seeks to determine ally/Illegality of actions embedded in specific state-sequences involving a given subject; (facts to be determined are the existence or non-existence of states of affairs)	some second individual	a penal trial, a sequence of fact-complexes involving judge, plaintiff, defendant (and their various representations) and structured by a set of picturing relationships between these, as between the trial itself and the initial facts at issue	language (sentences, pictures, models), which depict, successively, specific states of affairs e.g. in the life of the accused	physical mutilation, including death of, more generally, the placing of certain restrictions upon future actions of the accused/acquittal (the absence of such restrictions)
		Judge	legal process	means at the disposal of the court	punishment / reward meted out by the court